(8)

Supreme Court, U.S.
FILED
FEB 29 1996
CLERK

95-6465

No. ~~95-6564~~

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1996

Ray A. Lewis, *Petitioner*

v.

The United States of America, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE, THE JURY TRIAL GROUP, IN SUPPORT OF PETITIONER

Colin Dunham
President,
District of Columbia
Superior Court Trial
Lawyers' Association
600 F Street, N.W.
Washington, D.C. 20004
(202) 393-0123

Christopher Warnock
Staff Attorney, Jury Trial Group
Counsel of Record
2900 Adams Mill Rd, N.W.
Washington, D.C. 20009
(202) 234-6756

17pp

TABLE OF CONTENTS

Table of Authorities	ii-iv
Statement of Interest and Summary of Argument	1
Argument	2
I. *Transcending the Aggregation Problem*	2
II. *Inherent Nature versus Penalty*	5
III. *Blanton and Plain Language*	7
IV. *Conclusion*	11

TABLE OF AUTHORITIES

Argersinger v. Hamlin,
407 U.S. 25 (1972) 12

Baldwin v. New York,
399 U.S. 66 (1969) 7, 8, 11

Blanton v. City of North Las Vegas,
489 U.S. 538 (1989) 2-8, 11

Blockburger v. U.S.,
284 U.S. 299 (1932) 3, 4

Callan v. Wilson,
127 U.S. 540 (1888) 5, 9

Cheff v. Schnackenberg,
384 U.S. 373 (1965) 6

Codispoti v. Pennsylvania,
418 U.S. 506 (1973) 4

District of Columbia v. Clawans,
300 U.S. 617 (1937) 6. 7

Duncan v. Louisiana,
391 U.S. 145 (1967) 5, 7, 8-10

Ex parte Milligan,
71 U.S. 115 (1866) 5

Frank v. U.S.,
395 U.S. 147 (1969) 6

In re David Thornwell,
95-5184 2

Lewis v. U.S.,
65 F.3rd 257 (2nd Cir. 1995) 2-4, 8

Maryland v. Craig,
497 U.S. 836 (1990) (Scalia,J., dissenting) 12

Missouri v. Hunter,
459 U.S. 359 (1983) 3

Schick v. U.S.,
195 U.S. 65 (1904) (Harlan, J., dissenting) 10

U.S. v. Nachtigal,
113 S.Ct. 1672 (1993) 12

United States Constitution

Article Three, Section Two 2, 5-7, 9

Sixth Amendment 2, 5-7, 9, 11

Seventh Amendment 8, 9

Miscellaneous Constitutions, Statutes and Rules

Indiana Constitution of 1818 9

D.C. Code §6-2361 4

Criminal Justice Act of 1974,
Pub. L. 93-412 1

Fed. R. Crim. P. 8(a) 3

SCR-Crim 8(a) 3

Periodicals and Treatises

4 BLACKSTONE, COMMENTARIES 10, 11

F. Frankfurter, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*,
39 HAR. LAW REV. (1926) 9, 10

S. Kaye, *Petty Offenders Have No Peers*,
26 CHI. LAW REV. (1959) 9

T. Lynch, *Rethinking the Petty Offense Doctrine*,
4 KAN. J. LAW PUB. POL'Y (Fall 1994) 8, 11, 12

T. PLUCKNETT, CONCISE HISTORY OF
THE COMMON LAW (5th ed. 1956) 10

No. 95-6564

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1996

Ray A. Lewis, *Petitioner*

v.

The United States of America, *Respondent.*

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

***BRIEF OF AMICUS CURIAE,
THE JURY TRIAL GROUP,
IN SUPPORT OF PETITIONER***

STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

The District of Columbia Superior Court Trial Lawyers' Association ("SCTLA") is composed primarily of private criminal attorneys defending indigent clients under the Criminal Justice Act of 1974 (Pub. L. 93-412) in the District of Columbia courts. The Jury Trial Group ("JTG") is an independent affiliate of the SCTLA formed in 1994 to defend the right to jury trial in the District of Columbia. The JTG has appeared as *amicus curiae* before the District of Columbia Superior Court, as well as the District of Columbia Court of Appeals. The JTG filed a petition for writ of mandamus in

this Court, *In re David Thornwell*, 95-5184, denied October 2, 1996.

Both counsel for petitioner Lewis and the Solicitor General have consented to the filing of a brief *amicus curiae* by the JTG. Copies of written consents were filed with this Court on February 23, 1996 and original consents will be sent directly to the Clerk of the Court by the parties themselves.

In this brief *amicus curiae* will argue that the aggregation problem cannot be resolved within the parameters of the "petty" offense exception to the Article III and Sixth Amendment right to jury trial. Aggregation exposes a number of dilemmas, inherent in the "petty" offense exception, that can only be rationally resolved by returning the plain language of the Constitution.

ARGUMENT

I. *Transcending the Aggregation Problem*

When considering the question of the Sixth Amendment and Article Three right to jury trial, conventional wisdom views the issue of aggregation of "petty" offenses as the primary question still to be resolved. In *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989), this Court established the six month penalty test as, in reality, an automatic rule of law, departing from the usual precedent governing legal presumptions and allowing only collateral punishment to establish the rare exception to an otherwise inflexible denial of the constitutional right to jury trial for criminal offenses punishable by six months imprisonment or less. *Blanton*, 489 U.S. at 543. Thus, under *Blanton*, a defendant charged with a single offense punishable only by six months imprisonment is not constitutionally entitled to trial by jury. The primary question presented by *Lewis v. U.S.*, 65 F.3rd 257 (2nd Cir. 1995), and thus the instant appeal, is that of aggregation, which asks whether a defendant is entitled to trial by jury when charged in a single proceeding with multiple offenses, each of which is punishable by no more than six months imprisonment, but for which the aggregate sentence could exceed six months. Additionally, the Court has requested that parties brief the question of whether or not a judge, by

promising not to give more than a six months aggregate sentence, can deny jury trial for otherwise jury-demandable offenses.

The Second Circuit in *Lewis* initially answers the aggregation question by holding, without benefit of a citation or other support, that it is obvious that *Blanton* focuses on the seriousness of each individual offense. *Lewis*, 65 F.3rd 254. This is a circular argument because the focus of the inquiry as to seriousness is determinative of the result. The second answer given by the *Lewis* Court to the aggregation question is that, as the government could have tried each offense *seriatim*, aggregation in a single proceeding "provides no greater justification for a jury trial than if the charges were tried separately." *Lewis*, 65 F.3rd at 255. In order for a defendant to raise the aggregation argument, he must accept that some crimes are not triable by jury, i.e., those criminal offenses carrying a penalty of six months or less. Having accepted this initial premise, the *seriatim* argument is logically unanswerable as the inherent non-jury character of these offenses is not essentially altered by their aggregation in a single proceeding.

The suggestion by the Court that would allow a bench trial if the trial judge makes a pretrial commitment of a six month aggregate sentence, also violates the logic of the *seriatim* argument. Why should the government be forced to forego the punishment authorized for each offense, merely because they are aggregated? This is particularly true for offenses that may be of a similar character, but do not arise out of the same act or occurrence. F.R.Crim.P. 8(a); SCR-Criminal 8(a).

However, despite the logic of the *seriatim* argument, its necessary consequences cannot be constitutionally accepted. *Lewis* and other decisions denying jury trial for aggregated offenses have focused on the seriousness of each individual offense charged. Under the precedent of *Blockburger v. U.S.*, 284 U.S. 299 (1932), and its progeny, it is not a violation of double jeopardy for the legislature to establish multiple criminal offenses and multiple punishments for a single act. The State may even constitutionally charge and punish for both a greater and lesser included offense. *Missouri v. Hunter*, 459 U.S. 359 (1983). It is the legislature that determines the

unit of prosecution and therefore defines the offense. The convergence of *Blockburger* and the denial of aggregation allow for some startling results once we focus not on single, statutorily separate offenses, but on the total sentence at issue for all offenses in a single proceeding. This approach was followed in *Codispoti v. Pennsylvania*, 418 U.S. 506, 517 (1973), the primary precedent used to support jury trial for aggregated offenses.

In the District of Columbia, possession of unauthorized ammunition is a misdemeanor. D.C. Code §6-2361. The City Council could make this offense punishable by six months imprisonment, rendering it non-jury demandable under *Blanton*, and establish a single bullet as the unit of prosecution. Thus a defendant found in unlawful possession of a handgun with a twenty round magazine, a single act, could be charged with twenty counts of possession of unauthorized ammunition and convicted in a single bench trial and be sentenced to ten years imprisonment. Any discrete criminal act can result in an infinite number of criminal offenses. Thus under *Blanton*, *Blockburger* and the aggregation precedent articulated in *Lewis*, the legislature can amend the criminal code and totally eliminate jury trial for offenses punishable by imprisonment.

The Court has suggested that as a possible solution to this problem, a judge could make a pretrial commitment to give no more than six months imprisonment and still have a bench trial for aggregated proceedings. This is not a logical solution. It fails to address the *seriatim* argument. It does look to the total imprisonment imposed, but fails to consider the consequences of multiple convictions. It forces the trial judge to determine the maximum sentence before hearing the evidence in the case. The pretrial commitment rule would also be fairly simple for the government to avoid. Rather than formally aggregating cases they could be proceeded against separately, but on the same day and in front of the same judge, thus gaining much of the benefit of aggregation. The offenses would be non-jury demandable and sentences longer than six months could still be imposed for a single act.

The most serious danger in allowing a pretrial commitment of no more than six months imprisonment is

that this precedent, like failing to aggregate, can be used to eliminate trial by jury. There appears to be no reason why this same rationale would not apply to all offenses. If the trial judge promised to impose no more than six months imprisonment, why should he not be able to deny jury trial for a misdemeanor carrying a one year sentence or for a felony for which the maximum punishment is ten or twenty years imprisonment?

The dangers of refusing to aggregate offenses or permitting a pretrial commitment are obvious and a statutory interpretation that condones this precedent is obviously flawed. The Constitution does not, and cannot, contain the seeds of its own destruction; an interpretation of a constitutional provision that destroys the constitutional right embodied therein cannot be maintained. Yet the *seriatim* argument is logically unanswerable. This seeming paradox can only be resolved by transcending the aggregation argument. The logical and practical difficulties revealed by the aggregation problem can only be truly resolved by returning to the plain language of the Constitution and overruling the line of precedent that began with *Callan v. Wilson*, 127 U.S. 540 (1888), and had its logical culmination in *Blanton*. As this Court held in *Duncan v. Louisiana*, "...our decisions interpreting the Sixth Amendment are always subject to reconsideration." *Duncan v. Louisiana*, 391 U.S. 145, 158 (1967).

II. *Inherent Nature versus Penalty*

For the first century after the adoption of the Constitution, this Court strictly interpreted the language of the Sixth Amendment and Article Three requiring trial by jury even in wartime. See *Ex parte Milligan*, 71 U.S. 115, 120 (1866) ("The Constitution of the United States is a is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.") In *Callan v. Wilson*, 127 U.S. 540 (1888), this Court first articulated the concepts of "petty offenses", i.e., non-jury demandable crimes, versus "serious offenses", i.e., jury demandable crimes, creating the "petty offense exception" to the constitutional guarantees of jury

trial. The requirement that an jury demandable offense be "serious" rather than a crime created an immediate conflict between the plain language of the Constitution and Supreme Court precedent. U.S. Const. amend VI.; U.S. Const. art. III; see also *District of Columbia v. Clawans*, 300 U.S. 617, 634 (1937) (MacReynolds & Butler, JJ., dissenting). The inquiry into seriousness, however, still depended in the inherent nature of the offense. *Callan*, 127 U.S. at 556. This Court's holding in *Blanton v. City of North Las Vegas* that it would no longer inquire into the inherent nature of an offense very clearly breaks with previous Sixth Amendment jurisprudence. "...[O]ur earlier decisions focused on the nature of the offense and whether it was triable by jury at common law." *Blanton*, 489 U.S. at 541. The statement that "[i]n more recent years, however, we have sought more 'objective indications of the seriousness with which society regards the offense,'" *Blanton*, 489 U.S. 541, and the citation to *Frank v. U.S.*, 395 U.S. 147, 148 (1969) are misleading. *Frank* was a contempt case and contempts were not triable by jury at common law. *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1965) (criminal contempts by nature not jury-demandable). The reliance of the *Frank* Court on the "objective indications" precedent cited in *District of Columbia v. Clawans*, 300 U.S. 617 (1936) is also misleading. While precedent is occasionally obscure, *Clawans* is an example of pre-*Blanton* precedent that held that the inquiry into the objective indications of seriousness, predominately the penalty authorized or imposed, did not take place until a court determined that an offense was inherently petty and not of a criminal nature. In *Clawans*, which concerned the offense of selling second hand property without a license, this Court noted that this offense was not indictable at common law and held that its moral quality was inoffensive. *Clawans*, 300 U.S. at 625. But the *Clawans* Court refused

> ...to foreclose consideration of the severity of the penalty as an element to be considered in determining whether a statutory offense, *in other respects trivial and not a crime at common law*, must be deemed so serious as to be comparable with common law crimes, and thus to entitle the accused to the benefit of a jury trial prescribed by the Constitution.

(emphasis supplied) *Clawans*, 300 U.S. at 625. This principle was affirmed in *Duncan v. Louisiana*, 391 U.S. 145 (1967), where this Court held that "[c]rimes carrying possible penalties up to six months do not require jury trial *if they otherwise qualify as petty offenses*." (emphasis supplied) *Duncan*, 391 U.S. at 159.

Thus, the unanimous decision in *Blanton* represents not an adherence to or logical extension of previous precedent, but a revolutionary departure. The use of the six month test in *Baldwin v. New York* was a compromise, as several justices were willing to agree that more than six months imprisonment merited jury trial, but would not agree that less than six months imprisonment meant that there was no constitutional right to a jury. *Baldwin v. New York*, 399 U.S. 66, 74 (1969). Before *Blanton* and *Baldwin*, an inquiry as to the maximum penalty imposed was a secondary test, only resorted to for inherently petty offenses. This subsidiary test has swallowed the primary criterion, the inherent criminality or seriousness of an offense, just as the petty versus serious distinction restricted the constitutional guarantee of trial by jury for all crimes and the petty offense doctrine itself now threatens the constitutional right to jury trial. Thus over a century of Supreme Court jurisprudence addressing jury trial for "petty" offenses has shown the natural tendency for any exceptions to constitutional guarantees to grow and eliminate the rights they ostensibly qualify.

III. *Blanton and Plain Language*

The confusion evident in petty offense jurisprudence was and is necessary because *Blanton* is not just a departure from precedent, but contrary to the plain language of the Constitution. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..." U.S. Const. amend VI. Article Three provides that "[t]he trial of all crimes, except in cases of impeachment, shall be by jury..." U.S. Const. art. III § 2. The Sixth Amendment and Article

Three are unequivocal, unlike the Seventh Amendment, these provisions provide no exception to their clear commands. Some jurists have acknowledged the truly revolutionary nature of the *Blanton* six month penalty test. The Second Circuit in *Lewis* stated that "[d]*espite the absolute language of the Sixth Amendment*, the Supreme Court has made clear that a jury trial is required only for those offenses that are 'serious' in nature; bench trials are sufficient for 'petty' offenses." (emphasis supplied) *Lewis*, 65 F.3rd at 253-4. In his dissent in *Baldwin v. New York*, Justice Black rejected the "petty" or "serious" distinction,

> The Constitution guarantees a right of trial by jury in two separate places but in neither does it hint of any difference between 'petty' offenses and 'serious' offenses...Thus the Constitution itself guarantees a jury trial '[i]n all criminal prosecutions' and for 'all crimes.' Many years ago this Court, without the necessity of amendment pursuant to Article V, decided that 'all crimes' did not mean 'all crimes' but meant only 'all serious crimes.' Today three members of the Court would judicially amend that judicial amendment and substitute the phrase 'all crimes in which punishment for more than six months is authorized'...Such constitutional adjudication, whether framed in terms of 'fundamental fairness', 'balancing', or 'shocking the conscience' amounts in every case to little more than judicial mutilation of our written Constitution.

Baldwin, 399 U.S. at 74-5. This is the rule in the majority of jurisdictions. Cato Institute lawyer Timothy Lynch notes that "[a]pproximately thirty states already recognize the right to jury trial in petty criminal cases." T. Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J. LAW PUB. POL'Y 16 (Fall 1994).

Attempts have been made to justify the petty offense exception. In *Duncan v. Louisiana*, this Court notes correctly that some "petty" offenses were among those offenses tried summarily under colonial and English practice before the enactment of the Constitution. *Duncan*, 391 U.S. at 160.

The Court then holds,

> So-called petty offenses were tried without juries both in England and the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common law practice.

Duncan, 391 U.S. at 160. This holding is the so called "codification" argument and is erroneous. The codification argument was first raised in Justice Frankfurter's 1926 Harvard Law Review Article which asserts that the Sixth Amendment cannot be taken literally and that the Founders meant only to codify the existing practices of the colonies. F. Frankfurter, *Petty Federal Offenses and and the Constitutional Guaranty of Trial by Jury*, 39 HAR. LAW REV. 917-1013 (1926). The most substantial evidence that the Founders intended to depart from English and colonial practice before the Constitution is the clear language of the Sixth Amendment and Article Three which make no distinction between petty and serious offenses, but speak only of criminal offenses and crimes. U.S. Const. amend. VI; U.S. Const. art. III. It is notable that some state constitutions did make explicit exceptions to the right to trial by jury. The Indiana Constitution of 1818 states that, "in all criminal cases except in petit misdemeanors, which shall be punished by fine only, not exceeding three dollars...the right of trial by jury shall remain inviolate." S. Kaye, *Petty Offenders Have No Peers*, 26 CHI. LAW REV. 257-8 (1959) . Similarly, the Seventh Amendment makes an explicit exception to the right to jury trial for civil cases. U.S. Const. amend. VII.

Because *Callan* focuses on the inherent nature of an offense, its holding is not that all offenses tried without a jury previous to the Constitution may now be summarily tried, but that if an offense was tried summarily, this fact is simply one indication that the offense may be "petty". English and colonial practice was not based on the inherent nature of the offense: "There was no unifying consideration as to the type of criminal offense subjected to summary trial..."

Frankfurter, *supra* at 927. Despite the fact that some so-called "petty" offenses continued to be tried summarily, previously summary offenses were among those tried by jury after the adoption of the Constitution. Tax frauds and excise offenses, for example, were tried summarily by commissioners of excise and revenue and justices of the peace. 4 BLACKSTONE, COMMENTARIES * 278. Summary proceedings were appropriate, says Blackstone, because of the necessity of collecting revenue and the convenience for the Crown and defendants. 4 BLACKSTONE, COMMENTARIES * 278 These reasons, rather than assertions that tax fraud was not a crime or was somehow "petty", account for the fact that it was triable summarily.

Another error of the *Duncan* Court was the assertion that summary trials were part of the common law. All English summary trials occurred as a result of explicit parliamentary authorization. See *Schick v. U.S.*, 195 U.S. 65, 80 (1904) (Harlan, J., dissenting). "Very gradually the legislature ventured to make some offenses triable 'upon examination' by justices of the peace, that is to say, without a jury. This was a serious break with common law tradition at several points." T. PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW (5th ed. 1956) at 438. The most authoritative statement of the status of summary trials at common law is made by William Blackstone,

> By a summary proceeding I mean principally such as is directed by several acts of parliament (*for the common law is a stranger to it*, unless in the case of contempts)...But it has of late been so far extended, as if a check be not timely given to threaten the disuse of our admirable and truly English trial by jury, unless only in capital cases...This change in the administration of justice hath some mischievous effects...the extensive power of a justice of the peace, which even in the hands of a man of honour is highly formidable, will be prostituted to mean and scandalous purposes...and from these ill consequences we may collect the prudent foresight of our ancient lawgivers who suffered neither the property nor punishment of the subject to be

> determined by the opinion of any one or two men; and we may also observe the necessity of not deviating any further from our ancient constitution...

(emphasis supplied) 4 BLACKSTONE, COMMENTARIES * 277-9. Additionally, summary proceedings were most often used to "...inflict divers petty pecuniary mulcts and corporal punishment...for many disorderly offenses; such as common swearing, drunkenness, vagrancy, idleness..." 4 BLACKSTONE, COMMENTARIES * 278. Precedent which allowed a magistrate to order an offender whipped for vagrancy, swearing or drunkenness is rather disreputable, and is not persuasive precedent to support a modern denial of jury trial.

Finally, the codification argument is flawed because it ignores the fact that the Sixth Amendment does clearly depart from colonial practice and gives greater protections than were available under colonial practice and even under common law. For example, under the common law, the accused was not entitled to compulsory process for the production of witnesses. T. Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J. LAW PUB. POL'Y 14 (Fall 1994). The Sixth Amendment clearly makes compulsory process a required constitutional right explicitly departing from common law and colonial practice. U.S. Const. amend. VI. The codification argument would render the Constitution a nullity, as any provision that differed from the common law or colonial practice would be eliminated despite the plain language of the Constitution. The codification argument fails because a constitutional interpretation that eliminates the right it is meant to elucidate cannot be maintained. The relentless logic of Justice Black's dissent in *Baldwin* cannot be overcome.

IV. *Conclusion*

Part of the rationale of *Blanton* appears to have been a hope that a six month penalty standard would be simpler to apply than the inherent nature test. *Blanton*, 489 U.S. 541-2. Instead this Court is faced with the difficulties presented by the aggregation problem and in addition, it appears that this

Court will be faced with numerous cases raising claims of "serious" collateral consequences, e.g., *U.S. v. Nachtigal*, 113 S.Ct. 1072 (1993), due to the wide variety of non-imprisonment penalties. It has not proven difficult to approximate the standards imposed by the plain language of the Constitution to Sixth Amendment rights other than jury trial. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972). As noted earlier a majority of jurisdiction provide for jury trial for petty criminal offenses, "In fact, of the ten most populous cities in the United States, seven are currently operating under a rule that gives the right to a jury trial in any case where imprisonment is a *possible* penalty."(emphasis supplied) T. Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J. LAW PUB. POL'Y 14 (Fall 1994). Certainly it is difficult to accept a radical change in precedent that has the effect of reducing such a vital constitutional right.

Amicus curiae would urge this Court to re-examine the petty offense exception. To paraphrase Justice Scalia, for good or for bad, the Sixth Amendment requires jury trial, "...and we are not at liberty to ignore it. To quote the document one last time (for it plainly says all that need be said): 'in *all* criminal prosecutions; the accused shall enjoy the right [to a speedy and public trial by jury].'" *Maryland v. Craig*, 497 U.S. 836, 870 (1990) (Scalia, J., dissenting). Rather than viewing jury trial as an impediment to the smooth functioning of justice, *amicus curiae* urges this Court to restore the jury to its proper function as the pre-eminent guarantor of due process in the American judicial system for "all crimes" and "in all criminal prosecutions".

Respectfully submitted,

THE JURY TRIAL GROUP

Colin Dunham
President,
District of Columbia
Superior Court Trial
Lawyers' Association
600 F Street, N.W.
Washington, D.C. 20004
(202) 393-0123

Christopher Warnock
Staff Attorney, Jury Trial Group
Counsel of Record
2900 Adams Mill Rd, N.W.
Washington, D.C. 20009
(202) 234-6756